SUPREME COURT OF THE UNITED STATES.

No. 466.—October Term, 1942.

Department of Banking, State of Nebraska, as Receiver and Liquidating Agent of Farmers State Bank, Callaway, Nebraska, Petitioner, *vs.* Louis P. Pink, Superintendent of Insurance of the State of New York, as Liquidator of the National Surety Company.	On Petition for Writ of Certiorari to the New York Supreme Court.

[December 21, 1942.]

Per curiam: This case is here on a petition for certiorari to the Supreme Court of New York. It appears from the record that a judgment of that court was affirmed by an order of the Appellate Division, which was on June 18, 1942 ordered affirmed by the Court of Appeals, whose remittitur to the Supreme Court was issued the same day. On June 25 the order and judgment of the Court of Appeals were made the order and judgment of the Supreme Court.

A motion was afterwards filed in the Court of Appeals to amend its remittitur by adding to it the statement that a federal question, on which the petition for certiorari relies, was presented and necessarily passed upon in that court. So far as appears, the motion did not seek a reargument or rehearing of any part of the case; it was no more than a request that the Court of Appeals declare what had in fact occurred upon its previous decision of the case. On July 29 the Court of Appeals granted the motion and amended its remittitur accordingly. On September 16, the Supreme Court directed that the order amending the remittitur be made the order of the Supreme Court. The petition for certiorari was filed in this Court on October 20.

Under the three-months limitation imposed by the statute, 28 U. S. C. § 350, the petition for certiorari is timely only if the amendment of the remittitur extended the time within which to apply for certiorari. We are unable to conclude that it had such

effect. Unlike a motion for reargument or rehearing, it did not seek to have the Court of Appeals reconsider any question decided in the case. The final judgment already rendered was not challenged; what was sought was merely the court's certification that a federal question had been presented to it for decision, and this could have no different effect on the finality of the judgment than a like amendment of the court's opinion.

A timely petition for rehearing tolls the running of the three-months period because it operates to suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. Here no such alteration of the rights adjudicated was asked, and the finality of the court's first order was never suspended. Accordingly we must deny the petition for certiorari on the ground that it was not filed within the time provided by law.

Certain questions with respect to the timeliness of applications for review of state court judgments, which are now pending before us in petitions for rehearing in two cases, have recurred so frequently that we think it appropriate to add a word for the guidance of the Bar. It is true that our writ to review a judgment of the highest court of a state may properly run to a lower court where the record is physically lodged, and where under New York practice a judgment is entered upon the remittitur of the Court of Appeals. It is nevertheless immaterial whether the record is physically lodged in the one court or the other, since we have ample power to obtain it from either. *Atherton* v. *Fowler,* 91 U. S. 143, 146. In reliance upon the early decision in *Green* v. *Van Buskerk,* 3 Wall. 448, the period for appeal or application for certiorari has on occasion been computed not from the judgment or order of the New York Court of Appeals, but from the judgment subsequently entered by the lower court upon the Court of Appeals' remittitur. This practice, which is a departure from the rule applied to cases from other states, is inconsistent with our many decisions on the nature of a final judgment under § 237 of the Judicial Code, 28 U. S. C. § 344, and cannot be sanctioned. See especially Chief Justice Waite's opinion in *Mower* v. *Fletcher,* 114 U. S. 127, where a state appellate court's judgment was held to be final and reviewable when it ended the litigation by fully determining the rights of the parties, so that nothing remained

to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. See also *Wurts* v. *Hoagland,* 105 U. S. 701, 702, and *Clark* v. *Williard,* 292 U. S. 112, 117-118. This rule applies with equal force to cases from New York, in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of § 237 of the Judicial Code, a final judgment reviewable here.

For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (*Wick* v. *Superior Court,* 278 U. S. 575; *Cheltenham & Abbington Sewerage Company* v. *Pennsylvania Public Utility Commission,* No. 160, decided October 12, 1942), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court (see *Gorman* v. *Washington University,* 316 U. S. 98). Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established.

It was for this reason that we recently held that the three-months requirement had not been complied with in *Monks* v. *Lee,* No. 244, and *Bunn* v. *City of Atlanta,* No. 364, in which cases judgments were brought here for review from the courts of California and Georgia, and in each of which a petition for rehearing is today denied. The petition for certiorari in this case must likewise be denied for want of jurisdiction.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

Office - Supreme Court, U. S.
FILED
OCT 20 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942

No. 466.

IN THE MATTER

of

NATIONAL SURETY COMPANY, in Liquidation.

DEPARTMENT OF BANKING, STATE OF NEBRASKA, as Receiver and Liquidating Agent of Farmers State Bank, Callaway, Nebraska,

Petitioner,

against

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the National Surety Company,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

WALTER R. JOHNSON,
Attorney General of the
State of Nebraska,
Counsel for Petitioner.

MORRIS AMCHAN,
HOWARD SAXTON,
of Counsel.

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PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

The petition of the Department of Banking, State of Nebraska respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

Your petitioner is the Department of Banking, State of Nebraska, an executive arm of the government of the State of Nebraska, acting as trustee and receiver for depositors of a failed Nebraska bank.

On June 1, 1934, the National Surety Company, a New York corporation, was placed in liquidation by the Su-

preme Court of the State of New York, and the liquidation order fixed April 1, 1935 as the last day for filing claims in the New York liquidation proceeding (fol. 921). On June 4, 1934, the Department of Banking, State of Nebraska, as claimant, duly filed its claim with the New York Liquidator for $30,693.96 (fol. 171). On June 13, 1934, the Liquidator returned the proof of claim so filed, with a statement, that as to the National Surety Company, it "is not acceptable at this time in view of the failure of the assured to present notice and Proof of loss within the time provided for in the bond. * * * One of the conditions of the bond is that any loss properly recoverable under same must be discovered within fifteen months after the termination of the bond. Since the claim was not presented prior to October 1, 1932, we cannot recognize any liability at this time in connection with the statement of claim which you have submitted" (fols. 174-175).

The claim filed disclosed that it was predicated on losses sustained by the Farmers State Bank of Callaway, Nebraska, arising out of dishonest and unlawful acts of its bonded officers (fols. 304-354). The bonds were executed in the State of Nebraska, and contained a provision that they "shall be construed according to and be governed by the Laws of the State of Nebraska" (fol. 227).

With this summary disposition of its claim by the New York Liquidator, claimant instituted suit in the State of Nebraska on August 20, 1934, on the very losses that were theretofore filed and so summarily rejected by the Liquidator. The Nebraska action named as defendants the principals on the bonds, the National Surety Company and the reorganized National Surety Corporation (fols. 193-373).

Process was served on the National Surety Company, by serving its statutory agent, the Director of Insurance of the State of Nebraska (fol. 368). His authority as agent for the Surety Company is derived from a power

of attorney filed by the insurer with the Insurance Department of the State pursuant to Nebraska statutes, whereby the Insurance Commissioner was appointed statutory agent to receive process on its behalf (fols. 186-191). And the instrument filed, in conformity with the statute, provided "that this authority shall continue so long as any liability remains outstanding against the Company in this State" (fols. 724-726). The Nebraska Commissioner of Insurance forwarded process to the New York Liquidator, who acknowledged receipt of the summons and complaint, but elected to ignore it and defaulted in appearance (fol. 374).

The principals on the bonds and the reorganized National Surety Corporation, did however, appear by counsel, and the trial then proceeded in Nebraska where judgment was rendered against the principals on the bonds for the full amount, and against the National Surety Company, by default for $34,854.44 (fols. 379-420).

While this Nebraska action was pending, the claimant had garnisheed moneys of the National Surety Company which were on deposit with Nebraska banks in order to satisfy a judgment that claimant had against the surety company. On January 15, 1935, the New York Liquidator of the National Surety Company made application to the Nebraska Courts to vacate the garnishee, and asked that the moneys and assets be remitted to the Liquidator in New York for use of all creditors. The Nebraska Courts granted the Liquidator's application, vacated the garnishee and remitted the moneys and assets to New York (fol. 69).

Thereafter, in the Nebraska action, a referee was appointed and after extensive hearings, where some five volumes of testimony was taken (fols. 165, 168, 459-464), reported to the Court in detail on the cause then pending (fols. 421-678).

On this report the District Court of Nebraska rendered judgment against the principals on the bonds and the National Surety Company for $34,854.44 (fols. 127-140).

Claimant asked the Liquidator in New York to give to this judgment full faith and credit. The Liquidator declined to do so, and recommended the claim for disallowance (fols. 681-3). The New York Courts sustained the Liquidator and the Court of Appeals of that State, in its order of remittitur, recites that:

> "A question under the Federal Constitution was presented and necessarily passed upon in this proceeding by this Court, namely:
>
> Whether the judgment secured by the Department of Banking, State of Nebraska, was entitled to be accorded full faith and credit by the Courts of the State of New York pursuant to Article 4 of the Constitution of the United States. This Court held that the judgment was not required to be given full faith and credit pursuant to the Constitution of the United States."

B

Reasons Relied On for the Allowance of the Writ

Your petitioner respectfully submits that there is here presented an important question of law relating to the liquidation of an interstate insurer; the problem of the right of a non-resident creditor, who had previously filed his claim with the domiciliary liquidator, to invoke his local forum for the proof of such claim.

1. The Court of Appeals of the State of New York, in denying full faith and credit to the Nebraska judgment herein, has decided a Federal question of substance which is not in accord with applicable decisions of this Court, particularly,

Washington ex rel. Bond & G. & T. Co. v. *Superior Ct.*, 289 U. S. 361;
Clark v. *Williard*, 292 U. S. 112;
Fischer v. *American United Ins. Co.*, 314 U. S. 549.

2. The question is one of public importance which should be passed upon by this Court. The State of Nebraska feels that it has jurisdiction to pass on the merits of claims of its citizens against an insolvent interstate insurer which had been doing business in Nebraska pursuant to permission. The domiciliary liquidator was apprised of the claims by virtue of a filing of claim in his jurisdiction, and further, Nebraska remitted all local assets of the insurer to the domiciliary liquidator. Under such circumstances Nebraska feels that its citizens are not required to go to New York in order to have the merits of their claims passed upon, but may invoke their local forums for such purpose, since a determination of the merits of a claim did not involve a disturbance of the possession or control of the New York courts over the insurer's property.

The public importance of this question is again attested by the fact that the TNEC, in its Final Report and Recommendation (S. Doc. No. 35, 77th Cong. 1st Sess. [1941], pp. 559-602) calls attention to this problem and suggests the need of a solution by having the Federal Government take jurisdiction if the states cannot grant relief against the rigors of a rule that requires non resident creditors to seek the state of domicile of a foreign insurer in order to prove their claims against an insolvent interstate insurer.

Such questions of competing claims on the part of sister states respecting jurisdiction involving claims against an insolvent interstate insurer, are appropriate questions to be presented to this Court for determination.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York, County of New York, commanding that Court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the records and proceedings herein, and that the said judgment of the Supreme Court of the State of New York, may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioner will ever pray.

DEPARTMENT OF BANKING, STATE OF NEBRASKA, petitioner,

By

WALTER R. JOHNSON,
Attorney General of the
State of Nebraska,
Counsel for Petitioner.